Everything You Ever Wanted to Know About Federal Habeas and Then Some

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Federal habeas review of state criminal convictions is governed by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). *See* 28 U.S.C. §§ 2241, 2254. The AEDPA was enacted in response to the Oklahoma City bombing. Its main purpose was to curb delay in the execution of federal and state sentences, particularly capital cases, and to preserve the principles of comity, finality and federalism. That is, while state law must yield to the Bill of Rights and federal court decisions that define those rights, federal courts are required to respect state laws and the state courts that enforce them. Ultimately, state courts should have the first opportunity to correct any alleged wrong under the Constitution.

I. The Nuts and Bolts

A. Remedies

The only real remedy available in a federal habeas proceeding: the federal court can order the State to release the inmate. Typically, however, a conditional order will be issued, giving the State a fixed amount of time (e.g., 120 or 180 days) to do so unless the State corrects the error. Usually, this means the inmate will get a new trial, either on both guilt/innocence and punishment or just punishment.[1]

B. Right to counsel

Because federal habeas corpus is a statutory remedy, there is no constitutional right to counsel associated with it, as there is at trial and on direct appeal. Thus, petitioners who cannot afford a lawyer will generally proceed pro se (without counsel). The exception is death row inmates, who are guaranteed and appointed federally funded counsel by statute. Funding includes non-attorney personnel, such as investigators, forensic experts, and psychologists where a reasonable necessity can be demonstrated. *See* 18 U.S.C. § 3599; *see also* Rule 6, Rules Governing Section 2254 Cases (discovery).

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[1] In cases where the inmate has not challenged his conviction and/or sentence, but has instead attacked some aspect of criminal justice administration, i.e., the denial or revocation of parole or a prison disciplinary proceeding, the court can order a new parole hearing or restore lost good-time credits.

C. Documents filed

Once the direct appeal and state habeas proceedings conclude, a criminal defendant/inmate (now "the petitioner") will typically file a **petition** for habeas corpus relief in **federal district court** (in the district where his county of conviction is located).[2] In Texas, the respondent is always the Director of the Criminal Institutions Division for the Texas Department of Criminal Justice (TDCJ). According to the Texas Constitution, TDCJ is represented by the Attorney General's Office (OAG).[3] *See* Tex. Const. Art. 4, § 22. After the district court issues a **show cause order** (or scheduling order directing a response be filed), the OAG will file an **answer or motion for summary judgment**, arguing why the petitioner's claims must fail.[4] Sometimes, a **motion to dismiss** might be filed if there are procedural defenses (i.e. failure to exhaust or limitations) that can be asserted.[5]

The OAG will also submit any relevant records to the court as part of its responsive pleading. In cases where the inmate is challenging his conviction and sentence, these will be copies of the full state court record (direct appeal, which includes the reporter's record from the trial, and state habeas proceedings). In other cases, these will be portions of the inmate's parole file or prison disciplinary records.

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[2] Texas is divided into four federal districts: Northern (http://www.txnd.uscourts.gov/index.html), Southern (http://www.txs.uscourts.gov/), Eastern (http://www.txed.uscourts.gov/), and Western (http://www.txwd.uscourts.gov/default1.asp). Each district, in turn, is divided into divisions (usually located in major cities such as Houston, Dallas, Lubbock, El Paso, Austin, Beaumont, and Galveston).

[3] The Criminal Appeals Division represents the Director in federal habeas proceedings. For the non-capital cases, there are 18 lawyers; for the capital cases, there are 14 attorneys.

[4] *See* Rule 5, Rules Governing Section 2254 Cases (answers).

[5] In death-penalty cases, the statute of limitations is rarely an issue because the state direct appeal and state habeas proceedings run simultaneously. Further, in those cases, all claims are responded to with the assertion of any procedural defenses available as well as an argument that the claims are meritless. In non-capital cases, most judges now require an alternative answer to the merits of an inmate's claims regardless of any procedural defenses available.

D. Evidentiary hearings

Where a habeas petitioner has failed to fully develop the factual bases of his claims in state court, he is precluded from further factual development in federal court unless (1) his claims rely on a new rule of constitutional law or factual predicate previously undiscoverable through the exercise of due diligence, *and* (2) he establishes by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found him guilty. 28 U.S.C. § 2254(e)(2). A failure to meet this standard of "diligence" will bar a federal evidentiary hearing in the absence of a convincing claim of actual innocence that can only be established by newly discovered evidence. (*Michael*) *Williams v. Taylor*, 529 U.S. 420, 436 (2000). But even then, the federal court can still deny a hearing if sufficient facts exist to make an informed decision on the merits. *See Schriro v. Landrigan*, 550 U.S. 465, 474-75 (2007) ("It follows that if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing.") (citations omitted); *Clark v. Johnson*, 227 F.3d 273, 284-85 (2000).

If the federal court determines that there are factual issues not resolved by the record, a hearing may be ordered. At the hearing, both parties will call witnesses, typically the attorneys who represented the inmate during trial or on appeal, the prosecutors, witnesses who were not called at the original trial, and forensic or psychological experts. The hearing is always held before either the federal district judge or the magistrate judge; there is no jury.

Sometimes, rather than hold a hearing, the judge will order depositions. Here, both parties have a chance to question the witness just as they would at the hearing, the only difference being that no judge is present.

E. Decisions

After the pleadings have been filed and any hearings or depositions have taken place, the judge will issue an **opinion** in which the factual and legal background of the case is set out. As well, there is a discussion of each issue the inmate has asserted. In conjunction with the opinion, a **final judgment** will be issued.

If a magistrate judge has heard the case, he will issue his **recommendation** (which is just like an opinion), to which each party can object. Those objections are heard by the district judge, who will then issue an opinion addressing those objections and adopting or rejecting the magistrate's recommendation in whole or in part. Again, a final judgment will also issue.

F. Appeal

1. The court of appeals

Before an inmate is permitted to appeal a case to the **Fifth Circuit**,[6] the inmate must request and obtain a **certificate of appealability (COA)**.[7] *See* 28 U.S.C. § 2253(c). In the Fifth Circuit, a COA must be requested from the district court first, which will then grant or deny the request in whole or in part. If the court denies the COA, the inmate can then seek a COA from the Fifth Circuit. Otherwise, all claims which have a COA (whether from the district court or the Fifth Circuit) will proceed to briefing and (possibly) oral argument.

In non-capital cases, the OAG does not respond to requests for a COA. Indeed, in the vast majority of cases, the litigation is effectively over once the district court has issued its final judgment. In capital cases, however, the OAG is required to respond to everything, including requests for a COA.

The appeal will be heard by a randomly selected three-judge panel. It will consider the briefs of both parties (now referred to as "petitioner-appellant" and "respondent-appellee"). If the case is set for oral argument, each side in a non-capital case is given 20 minutes to argue; each side in a capital case is given 30 minutes to argue. If the inmate was proceeding pro se in the lower court, an attorney will be appointed for him.

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[6] Texas is one of three states (along with Louisiana and Mississippi) that fall into the jurisdiction of the Fifth Circuit Court of Appeals, which sits in New Orleans, LA. http://www.ca5.uscourts.gov/.

[7] The OAG is not required to obtain a COA in cases where it is appealing a loss.

Once a decision is made, the court will issue an **opinion** affirming or reversing the district court's judgment. The losing party may then file a **petition for rehearing, either by the panel or the en banc (entire) court**. Panel rehearing is typically used to correct factual errors in the opinion. En banc rehearing is another matter entirely. If such is granted, the panel opinion is vacated, the case is rebriefed, and eventually argued before the entire court. The en banc court will then issue its own opinion. This is extremely rare, as it is reserved for especially important legal issues with wide-ranging impact.

2. The Supreme Court

The last chance (for either side) is the **United States Supreme Court**.[8] The losing party in the court of appeals has 90 days to file a **petition for certiorari review (cert. petition)**, a legal brief requesting the Court to hear the case. In non-capital cases, the OAG does not respond to cert. petitions with a **brief in opposition (BIO)** unless ordered to do so, but this is a rarity. In capital cases, BIOs are requested in every case. The Court will not grant certiorari review without a BIO. If certiorari review is granted, a briefing schedule will be issued, and the case will be set for oral argument before the Court.

II. The Nitty Gritty

The vast majority of claims allege ineffective assistance of counsel (under *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny), prosecutorial misconduct (under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny) or jury misconduct.[9] In order for the district court to grant relief on an alleged violation of the federal constitution:

(1) the petition must be timely;

(2) all of the claims must have been exhausted in the state courts (i.e., the claims must have been presented to the state courts in a procedurally proper manner);

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[8] http://www.supremecourt.gov/.

[9] Other common claims include challenges to Texas's death penalty-scheme, claims of juror bias pursuant to *Witherspoon v. Illinois*, 393 U.S. 898 (1968), and its progeny, and claims alleging that the prosecutor has used a peremptory challenge in a racially biased manner pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986).

(3) if a claim has not been exhausted and is thus procedurally defaulted or barred, the petitioner must overcome that bar by a showing of either "cause and prejudice" or actual innocence;

(4) for those claims that are exhausted, the petitioner must establish that the state court's rejection was objectively unreasonable;

(5) the claim must not be *Teague*-barred;[10]

(6) the petition must not be successive; and

(7) if the court determines that the state court was objectively unreasonable in rejecting a particular claim, the federal district court must still conduct a harm analysis where appropriate.

Note: Federal habeas relief is not available for claims arising under state law. Rather, it is only available for claims arising under the federal Constitution, specifically the Fifth (right against self-incrimination), Sixth (right to counsel), Eighth (right to be free from cruel and unusual punishment), and Fourteenth Amendments (right to due process and equal protection). Claims alleging a Fourth Amendment violation (e.g., searches and seizures) are generally barred under *Stone v. Powell* as long as the petitioner had a "full and fair" opportunity to litigate the claim in state court. 428 U.S. 465, 494 & n.37 (1976). Despite the *Stone* bar, such a claim is usually boot-strapped to claim of ineffective assistance of counsel, which then makes it reviewable, at least indirectly. *Kimmelman v. Morrison*, 477 U.S. 365, 374-75 (1986).

A. Statute of Limitations 28 U.S.C. § 2244(d)

1. General rule

The one year-period generally runs from the date the conviction becomes final by the conclusion of direct review (including the filing of a cert. petition) or the time for seeking such expires. 28 U.S.C. § 2244(d)(1)(A); *see also Gonzalez v. Thaler*, 132 S. Ct. 641, 653-54 (2012). However, the AEDPA provides three exceptions to this general rule.

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[10] *Teague v. Lane*, 489 U.S. 288 (1989).

In death penalty cases, the statute of limitations generally begins to run from the date the state habeas application is denied. This is because the direct appeal and the state habeas proceedings run concurrently. *See* Tex. Code Crim. Proc. art. 11.071.

The limitations analysis is measured with respect to the moment each individual claim within the petition is actually filed, not with respect to the petition itself. *Pace v. DiGuglielmo*, 544 U.S. 408, 416 n.6 (2005). This rule necessarily applies to amended claims; thus, whether an amended claim "relates back" to the date of an earlier filed claim depends on whether the amended claim asserts a new ground for relief supported by facts that differ in both time and type from those set forth in the original pleading. *Mayle v. Felix*, 545 U.S. 644, 650 (2005); *see* Fed. R. Civ. P. 15(c).

2. Exceptions

First, the one-year period may run from the time a State-created impediment (violating the Constitution or laws of the United States) is removed. 28 U.S.C. § 2244(d)(1)(B). The actions of defense counsel—even where defense counsel is a public defender—will not constitute "State action." *See Dunker v. Bissonnette*, 154 F.Supp.2d 95, 104 (D. Mass. 2001). But "a state's failure to provide the materials necessary to prisoners to challenge their convictions or confinement … constitutes an impediment for purposes of invoking § 2244(d)(1)(B)" because it "violates the First Amendment right, through the Fourteenth Amendment, to access to the courts." *Egerton v. Cockrell*, 334 F.3d 433, 438-39 (5th Cir. 2003).

Second, the one-year period may start to run from the date on which a newly-recognized constitutional right was initially recognized by the Supreme Court *and* that right has been made retroactively applicable to cases on collateral review. 28 U.S.C. § 2244(d)(1)(C). For example, a death-row inmate (whose conviction was already final) wanting to assert that he was mentally retarded and therefore ineligible to be executed had one year from the time the Supreme Court issued its opinion on June 20, 2002, in *Atkins v. Virginia*, 536 U.S. 304, to do so. *See In re Hearn*, 376 F.3d 447, 456 n.11 (5th Cir. 2004). A claim that a defendant was under eighteen years of age would also fall into this category. *See Roper v. Simmons*, 543 U.S. 551 (2005).

Third, the one-year period may start to run from the date on which the factual predicate of the claim or claims could have been discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1)(D). Thus, the time does not commence "when [the factual predicate] was actually discovered by a given prisoner," or "when the prisoner recognizes [the] legal significance [of important facts]." *Owens v. Boyd*, 235 F.3d 356, 359 (7th Cir. 2000). Nor does this exception provide time for the petitioner to "gather[] every possible scrap of evidence that might, by negative implication, support his claim." *Flanagan v. Johnson*, 154 F.3d 196, 199 (5th Cir. 1998). Finally, as the Supreme Court has recently stated, "due diligence, we have observed, is an inexact measure of how much delay is too much." *Walker v. Martin*, 131 S. Ct. 1120, 1129 (2011) (internal quotation marks and citation omitted). It does not require the petitioner "to undertake repeated exercises in futility or to exhaust every imaginable option." *Anjulo-Lopez v. United States*, 541 F.3d 814, 818 (8th Cir. 2008). But it does require, at the least, that reasonable efforts to discover the facts supporting the claims be made. *Id.* Further, this exception is not available for those who "sleep on their rights." *Fisher v. Johnson*, 174 F.3d 710, 715 n.14 (5th Cir. 1999).

3. Statutory tolling

A "properly filed" application for "state post-conviction or other collateral review" tolls the limitations period while it is pending. 28 U.S.C. § 2244(d)(2). "A 'properly filed' application is one that conforms with a state's applicable filing procedural requirements." *Villegas v. Johnson*, 184 F.3d 467, 470 (5th Cir. 1999) (holding that a state habeas application dismissed pursuant to Texas Code of Criminal Procedure Article 11.07, Section 4 was "properly filed"); *see also Larry v. Dretke*, 361 F.3d 890, 894 (5th Cir. 2004) (state habeas application filed before mandate issues or is otherwise "non-compliant" is "not properly filed"). So as long as an application is "properly filed," it will toll for "as long as the ordinary state collateral review is 'in continuance'—i.e., 'until the completion of that process.'" *Carey v. Saffold*, 536 U.S. 214, 219-20 (2002) (citation omitted) (holding that the time between state applications is not tolled). But an application is *not* pending while a petitioner seeks review by the Supreme Court from the denial of habeas relief by the state court. *See Lawrence v. Florida*, 549 U.S. 327, 334 (2007) ("When the state courts have issued a final judgment on a state application, it is no longer pending even if a prisoner has additional time for seeking review of that judgment through a petition for certiorari.").

A federal habeas application does not toll the limitations period. *See Duncan v. Walker*, 533 U.S. 167, 181 (2001) ("We hold that an application for federal habeas corpus review is not an 'application for State post-conviction or other collateral review' within the meaning of 28 U.S.C. § 2244(d)(2)."). But a motion for DNA testing under Texas law is considered "other collateral review" and will toll the statute of limitations. *Hutson v. Quarterman*, 508 F.3d 236, 240 (5th Cir. 2007).

4. Equitable tolling

Because the time-bar is not jurisdictional, a petitioner is entitled to equitable tolling if he shows "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way" and prevented him from timely filing. *Holland v. Florida*, 560 U.S. 631, 649 (2010); *Day v. McDonough*, 547 U.S. 198, 205, 213 (2006). For instance, the Supreme Court has held that extreme failures by counsel justify equitable tolling. *See Maples v. Thomas*, 132 S. Ct. 912 (2012); *Holland*, 560 U.S. at 653 (counsel (1) failed to timely file application despite prisoner's many admonitions on the importance of doing so, (2) failed to do research to ascertain filing deadline despite prisoner's letters identifying applicable legal rules, (3) failed to provide information to prisoner so that he could monitor his case, and (4) failed to communicate with prisoner over a period of years). This is to be distinguished from ordinary negligence. *See Lawrence*, 549 U.S. at 336-37 (counsel's simple mistake in calculating limitations period did not justify equitable tolling). Also, the Fifth Circuit has refused to allow equitable tolling where the filing deadline was missed by just a few days—even in a death-penalty case. *See Lookingbill v. Cockrell*, 293 F.3d 256, 264 (5th Cir. 2002) ("We have consistently denied tolling even where the petition was only a few days late.").

B. Exhaustion 28 U.S.C. § 2254(b), (c)

1. Generally

The purpose of exhaustion "is not to create a procedural hurdle on the path to federal habeas court, but to channel claims into an appropriate forum, where meritorious claims may be vindicated and unfounded litigation obviated before resort to federal court." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992). "Comity concerns dictate that the requirement of exhaustion is not satisfied by the mere statement of a federal claim in state court." *Id.*; *see also Baldwin v. Reese*, 541 U.S. 27, 31 (2004) ("[T]o say that a petitioner 'fairly presents' a federal claim when an appellate judge can discover that claim only by reading lower court opinions in the case is to say that judges *must* read the lower court opinions—for otherwise they would forfeit the State's opportunity to decide that federal claim in the first instance. In our view, federal habeas corpus law does not impose such a requirement.") (emphasis in original).

To that end, a petitioner must first have provided the state's highest court with a fair opportunity to apply (1) the controlling federal constitutional principles to (2) the same factual allegations. *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995); *Rose v. Lundy*, 455 U.S. 509, 522 (1982). Thus, a petitioner must present both the same *legal theory* and the same *factual basis* of a claim to the Court of Criminal Appeals (either on direct appeal or in a state habeas application) in order to meet the exhaustion requirement. *See Dowthitt v. Johnson*, 230 F.3d 733, 745-46 (5th Cir. 2000) (citations omitted); *Nobles v. Johnson*, 127 F.3d 409, 420 (5th Cir. 1997) (citation omitted). Factual exhaustion often turns on whether the new facts "fundamentally alter the legal claim already considered by the state courts." *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986); *see also Morris v. Dretke*, 413 F.3d 484, 491 (5th Cir. 2005).

2. Stay and Abeyance/mixed petitions

In *Rhines v. Weber*, the Supreme Court delineated the "limited circumstances" in which a federal habeas court has the discretion to "stay and abate" federal habeas proceedings to allow a petitioner to present his unexhausted claims to the state court in the first instance and then to return to federal court for review of his perfected petition. 544 U.S. 269 (2005). The Court unanimously held that a federal court has the authority to do this so that a petitioner can exhaust his claims in state court without running the risk that his claims would be time-barred upon his return to the federal forum. *Id.* at 275-76. Nevertheless, recognizing that the stay and abeyance has the potential to undermine the AEDPA's objectives of reducing delay ("particularly in a capital case") and encouraging petitioners to bring all of their claims to state court before seeking federal relief, the Court held that "stay and abeyance should be available in limited circumstances." *Id.* at 277. Specifically, (1) the district court must "determine[] there was good cause for the petitioner's failure to exhaust his claims first in state court," (2) "the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless," (3) "district courts should place reasonable time limits on a petitioner's trip to state court and back," and (4) "if a petitioner engages in abusive litigation tactics or intentional delay, the district court should not grant him a stay at all." *Id.* at 277-78.

C. Procedural Default/Procedural Bar

1. General rule

When a claim has not been presented to the Court of Criminal Appeals for review (either on direct appeal or in a state habeas application) in a procedurally correct manner or has not been presented at all, it is procedurally defaulted or procedurally barred in federal court. *Wainwright v. Sykes*, 433 U.S. 72 (1977). This is an affirmative defense, meaning the state must raise it in the district court or waive it. *Gray v. Netherland*, 518 U.S. 152, 165-66 (1996).

Whatever bar the state court has invoked to preclude review of a federal constitutional claim must be "both independent of the merits of the federal claim and an adequate basis for the court's decision." *Finley v. Johnson*, 243 F.3d 215, 218 (5th Cir. 2001) (citations omitted). Further, the state court must "clearly and expressly indicate that it rests on state grounds which bar relief, and the bar must be strictly or regularly followed by state courts, and applied to the majority of similar claims." *Id.* (internal quotation marks and citation omitted); *see also Harris v. Reed*, 489 U.S. 255, 265 (1989) (federal habeas review procedurally barred only where the last state court expressly and unambiguously based its denial of relief on procedural default). There is one exception to this rule, however: if the petitioner has failed to exhaust his claims, and the state court to which he would be required to present his claims would find them procedurally barred, those claims are procedurally defaulted from federal habeas review. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

Unless a petitioner can demonstrate either cause and prejudice or a fundamental miscarriage of justice to overcome the bar, federal habeas review will be precluded. *Id.* at 750. However, the Supreme Court has explained that "a federal court faced with allegations of actual innocence, whether of the sentence or the crime charged, must first address all nondefaulted claims for comparable relief and other grounds for cause to excuse the procedural default." *Dretke v. Haley*, 541 U.S. 386, 393-94 (2004).

2. Cause and prejudice

Cause "must be something *external* to the petitioner, something that cannot be attributable to him." *Id.* Generally speaking, a claim that an inmate's attorney was ineffective during the state habeas proceedings cannot be cause. *But see Trevino v. Thaler*, 133 S. Ct. 1911 (2013); *Martinez v. Ryan*, 132 S. Ct. 1309 (2011).

3. Fundamental miscarriage of justice

a. Actual innocence of the conviction

A petitioner can establish a fundamental miscarriage of justice only where he shows that he is actually (factually) innocent of the crime of which he was convicted. *Schlup v. Delo*, 513 U.S. 298, 316 (1995); *see also Finley*, 243 F.3d at 221 (stating that the "purpose of the exception is to prevent a miscarriage of justice by the conviction of someone who is entitled to be acquitted because he did not commit the *crime* of conviction") (internal quotation marks and citation omitted) (emphasis in original). In order to establish innocence as a gateway to have defaulted claims considered, a petitioner "must establish that, in light of the new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" *House v. Bell*, 547 U.S. 518, 536-37 (2006) (quoting *Schlup*, 513 U.S. at 327). To be credible, this new evidence (i.e., evidence not presented at trial), "'whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or physical evidence,'" must be reliable. *Id.* at 537 (quoting *Schlup*, 513 U.S. at 324).

Note: This is not the same claim as a free-standing claim of actual innocence, which cannot support federal habeas relief. *See Herrera v. Collins*, 506 U.S. 390, 404 (1993). But *Herrera* did leave open the question of whether "in a capital case[,] a truly persuasive claim of actual innocence made after trial would render the execution of a defendant unconstitutional and warrant federal habeas relief if there were no state avenue open to process such claim." *Id.* at 417. In Texas, the Court of Criminal Appeals has held that free-standing claims of actual innocence may be raised in a state habeas application. *Ex parte Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996). Further, the Fifth Circuit has held that executive clemency is another avenue by which a free-standing claim of actual innocence may be asserted. *See Lucas v. Johnson*, 132 F.3d 1069, 1075 (5th Cir. 1998).

b. Actual innocence of the death penalty

A petitioner can also show a fundamental miscarriage of justice by showing actual innocence of the death penalty. *Sawyer v. Whitley*, 505 U.S. 333 (1992); *Smith v. Murray*, 477 U.S. 527, 537 (1986) (holding that actual innocence "does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense," but holding that petitioner had failed actual innocence of the death penalty in any event"). This goes to the jury's finding that the petitioner would constitute a future danger to society. *See Sawyer*, 505 U.S. at 345 ("Sensible meaning is given to the term "innocent of the death penalty" by allowing a showing in addition to innocence of the capital crime itself that there was no aggravating circumstance or that some other condition of eligibility had not been met."); *Rocha v. Thaler*, 626 F.3d 815, 823 (2011) (noting that *Sawyer* "expressly rejected the argument that a constitutional error that impacts only the jury's *discretion* whether to *impose* a death sentence upon on defendant who is unquestionably *eligible* for it under state law can be considered sufficiently fundamental as to excuse the failure to raise it timely in prior state and federal proceedings."); Tex. Code Crim. Proc. art. 37.071 § 2(b)(1). In order to establish actual innocence of the death penalty, the petitioner must "show by clear and convincing evidence that but for constitutional error at his sentencing hearing, no reasonable juror would have found him eligible for the death penalty under [state] law." *Sawyer*, 505 U.S. at 350.[11]

[11] *Dretke v. Haley* declined to extend the exception for actual innocence of the death penalty to procedural default of constitutional claims challenging noncapital sentencing error. 541 U.S. at 393. Thus, a petitioner cannot allege he is actually innocent of a sentence less than death.

D. Standard of Review

1. 28 U.S.C. § 2254(d)

28 U.S.C. § 2254(d) provides that where a claim was adjudicated on the merits in state court, federal habeas relief cannot be granted unless that state-court adjudication:

> (1) resulted in a decision that was [a] contrary to, or [b] involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

As the Supreme Court has recently explained: "[28 U.S.C. §] 2254(d) reflects the view that habeas corpus stands as a "guard against extreme malfunctions in the state court criminal justice systems, not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011). Thus, even a strong case for relief does not mean the state court's contrary conclusion was unreasonable. *Id.*

"Clearly established Federal law" refers to the holdings, as opposed to the dicta, of the Supreme Court's decisions as of the time of the relevant state court decision. *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003) (citing (*Terry*) *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). "In other words, 'clearly established federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court reaches its decision." *Id.* at 71-72 (citations omitted).

A decision is "contrary to" clearly established federal law if the state court "applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases," or confronts facts that are "materially indistinguishable" from relevant Supreme Court precedent but reaches an opposite result. (*Terry*) *Williams*, 529 U.S. 405-06. To this end, a state court unreasonably applies Supreme Court precedent *only if* it correctly identifies the governing precedent but unreasonably applies it to the facts of the particular case. *Id.* at 407-09. In order to determine if the state court made an unreasonable application, a federal court "must determine what

arguments or theories supported or … *could have supported*, the state court's decision; and then it must ask *whether it is possible fairminded jurists could disagree* that those arguments or theories are inconsistent with the holding in a prior decision of [the] Court." *Richter*, 131 S. Ct. at 786 (emphasis added). Thus, federal habeas relief is precluded where "fairminded jurists could disagree" regarding the state court's decision that a claim lacked merit. *Id.* (internal quotation marks and citation omitted); *see also Woodford v. Visciotti*, 537 U.S. 19, 27 (2002) (federal habeas relief is only merited where the state court decision is both incorrect *and* objectively unreasonable, "whether or not [this Court] would reach the same conclusion").

A state court's decision need not expressly cite any federal law or even be aware of applicable Supreme Court precedent in order to be entitled to deference. *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003); *Early v. Packer*, 537 U.S. 3, 8 (2002) (state court decision must be upheld so long as the result does not contradict Supreme Court precedent).

It is the state court's ultimate decision that is to be tested for unreasonableness, "not every jot of its reasoning." *Santellan v. Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001); *see also Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (en banc) (holding that a federal court's "focus on the 'unreasonable application' test under [§] 2254(d) should be on the ultimate legal conclusion the state court reached and not on whether the state court considered and discussed every angle of the evidence"); *Catalan v. Cockrell*, 315 F.3d 491, 493 (5th Cir. 2002) ("[W]e review only the state court's decision, not its reasoning or written opinion[.]").

Finally, the Supreme Court recently explained that only the record that was before the state court can be considered to decide whether the adjudication was objectively unreasonable. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011).

2. 28 U.S.C. § 2254(e)(1)

Regarding questions of fact, federal courts must presume the state court's factual findings correct unless the petitioner "rebut[s] the presumption of correctness with clear and convincing evidence." 28 U.S.C. § 2254(e)(1). "The presumption of correctness not only applies to explicit findings of fact, but it also applies to those unarticulated findings which are necessary to the state court's conclusions of mixed law and fact." *Valdez v. Cockrell*, 274 F.3d 941, 948 n.11 (5th Cir. 2001).

E. *Teague v. Lane*

Teague v. Lane sets out a three-part analysis for determining whether a new rule of law should be made retroactive to cases already on collateral review. **First**, when did the petitioner's conviction become final?

Second, what was the "legal landscape as it then existed"? In other words, was the rule compelled, or is it actually "new"? A rule is "new" if it "breaks new ground or imposes a new obligation on the States or the Federal government" or if it was not "*dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301 (citations omitted) (emphasis in original).

Third, does the rule come within either of the exceptions set out in *Teague*? The **first exception** encompasses substantive rules, defined as rules "plac[ing] certain kinds of primary, private individual conduct beyond the power of the criminal law-making to proscribe." *Id.* at 307 (internal quotation marks and citations omitted). Examples of this include: *Atkins v. Virginia*, 536 U.S. 304 (holding that the Eighth Amendment prohibits the execution of those determined to be mentally retarded at the time the capital offense was committed), and *Roper v. Simmons*, 543 U.S. 551 (holding that the Eighth Amendment prohibits the execution of those who were less than eighteen years old at the time the capital offense was committed). The **second exception** encompasses those procedural rules "that … are implicit in the concept of ordered liberty." *Teague*, 489 U.S. at 311. These are "watershed rules of criminal procedure." *Id.* The *only* example of this is *Gideon v. Wainwright*, 327 U.S. 335 (1963), which extended the right to counsel "in all criminal prosecutions" the States through the Fourteenth Amendment.

F. Second/Successive Petitions 28 U.S.C. § 2244(b); *see also* Fed. R. Civ. P. 60(b)

1. General rule

The AEDPA provides that "a claim presented in a second or successive habeas corpus application under § 2254 that was presented in a prior [federal] petition shall be dismissed." 28 U.S.C. § 2244(b)(1). Further, a petitioner wishing to file a second or successive petition must first receive permission from the appellate court, *not* the district court. *Id.* at § 2244(b)(3). The circuit court's decision to deny permission is not appealable. *Id.*

2. Rule 60(b) motions

In the federal habeas context, petitioners use Federal Rule of Civil Procedure 60(b) in an attempt to circumvent the rules governing successive or second habeas petitions. By its terms, Rule 60(b)(6) allows the district court to "relieve a party … from a final judgment, order, or proceeding for … any other reason [outside those listed] that justifies relief." However, the general rule is that such a motion *will be* construed as a successive or second petition, and thus, denied. Only where the motion "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings" will such a motion be allowed. *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005) (footnote omitted). For example, where a petitioner merely asserts a prior *procedural* ruling was in error (and that error precluded a merits determination), he has not raised a habeas claim. *Id.* at n.4; *see Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012) (challenging the court's determination that his claims were procedurally defaulted) (citations omitted).

In the event that the Rule 60(b) motion is proper, it may only be granted in "extraordinary circumstances." *Gonzalez*, 545 U.S. at 535 (noting that such circumstances will "rarely occur on the habeas context"). The Fifth Circuit holds that "changes in decisional law do not constitute the 'extraordinary circumstances' required for granting Rule 60(b)(6) relief." *Hess v. Cockrell*, 281 F.3d 212, 216 (5th Cir. 2002).

3. Exceptions

Claims *not* raised in a prior federal habeas petition are permitted under two narrow circumstances: (1) if the petitioner relies on a "new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," or (2) the petitioner raises a claim based on newly discovered evidence that, but for constitutional error, no rational jury would have found the petitioner guilty of the underlying offense." *Id.* at § 2244(b)(3).

Another exception has been carved out for a claim that an inmate is incompetent to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986). *See Panetti v. Quarterman*, 551 U.S. 930 (2007). Such claims are not ripe until after the federal habeas proceedings have concluded, and an execution date has been set. *Id.* at 945-47.

G. Harmless Error

Most trial errors—even those of constitutional dimension—are subject to a harmless-error analysis. *Arizona v. Fulminante*, 499 U.S. 279, 206, 207-08 (1991) (It has long been settled that "trial error" is that which has "occurred during the presentation of the case to the jury, and … may therefore be qualitatively assessed in the context of other evidence presented to determine whether its admission was harmless.") *Brecht v. Abrahamson* mandates that the standard of review for harm on federal habeas is "whether the error 'had a substantial and injurious effect or influence in determining the jury's verdict." 507 U.S. 619, 637 (1993) (internal quotation marks and citation omitted). This standard applies "whether or not the state appellate court recognized the error and reviewed it for harmlessness under the [*Chapman* standard]."[12] *See Fry v. Pliler*, 551 U.S. 112, 121-22 (2007).

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[12] On direct appeal, *Chapman v. California*, requires a showing that the error was "harmless beyond a reasonable doubt." 386 U.S. 18, 24 (1967).

III. **Crime Victims' Rights Act (CVRA)** 18 U.S.C. § 3771

Under the CVRA, victims are given many of the same rights provided for under state law.[13] Relevant to federal habeas proceedings, they are specifically afforded the following rights: (1) "[t]he right not to be excluded from any [] public proceeding [involving the crime], unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at the proceeding," (2) "[t]he right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding," (3) **"[t]he right to proceedings free from unreasonable delay,"** and (4) "[t]he right to be treated with fairness and with respect for the victim's dignity and privacy." 18 U.S.C. § 3771(b)(2).

Subsection (d)(1) allows the Attorney General to enforce these rights. The OAG may do so, first, by filing a motion for relief in the district court. If the district court denies that motion, a writ of mandamus may be sought in the court of appeals. *Id.* at (d)(3).

Note: The CVRA does not create any right to intervene in federal habeas proceedings where a state conviction is being challenged. *See Brandt v. Gooding*, 636 F.3d 124,136 (4th Cir. 2011).

Ladd v. Stephens (1996 murder): On April 23, 2003, the day of his scheduled execution, the Fifth Circuit granted Ladd a stay of execution and authorized the filing of a successive federal habeas petition asserting an *Atkins* claim. An evidentiary hearing was held in July, 2005. On June 4, 2012, we filed a motion in the district court requesting that the court deny Ladd's petition. We asserted that the length of time the petition had been pending was unreasonable and further noted the victim's family's right to be free from unreasonable delay under the CVRA. The lower court took no action. On February 13, 2013, we filed a Petition for Writ of Mandamus in the Fifth Circuit arguing unreasonable delay. Two days later, the district issued its opinion denying federal habeas relief.

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[13] *See* Tex. Code Crim. Proc. art. 56.02.

Vasquez v. Stephens (1998 murder): After Vasquez filed his federal habeas petition in 2002, the case was referred to the magistrate, who issued a report and recommendation that federal habeas relief be denied in December, 2005. In October, 2013, we filed a motion for judgment, citing the CVRA, but the court took no action on it. We then sought mandamus relief in the Fifth Circuit. The district judge assured the appellate court he would issue a ruling promptly, so the mandamus was denied. Ultimately—after expedited supplemental briefing—a new report and recommendation was issued and adopted in March, 2014.

IV. Always Expect the Unexpected

Rais Bhuiyan: Shortly after 9-11, Mark Stroman—seeking revenge for 9-11––went on a killing spree against people he viewed as Arab. Bhuiyan survived being shot in the shot in the face. Once an execution date was set for Stroman, however, Bhuiyan attempted to prevent the execution from going through. After his request for victim/offender mediation was turned down by TDCJ (because it was made too close to the execution date and, at the time, required 6 months to be set up), Bhuiyan requested a stay of execution in state court. A hearing was begun, but it was ended immediately after the judge was notified that we had successfully obtained a writ of prohibition from the Court of Criminal Appeals.